Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CHARLES RAY OSWALD, ET UX.

Petitioner

versus

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

Respondent

ON PETITION FOR WRIT OF CERTIORARI OR REVIEW ON BEHALF OF DEFENDANTS/APPLICANTS CHARLES R. AND MARIE OSWALD TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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48 pp

ISSUES

1. Whether the Louisiana Supreme Court and the Louisiana Second Circuit Court of Appeal erred in overruling the Caddo Parish Trial Court in its determination that the property owner was entitled to compensation in excess of the market value of the property taken, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 4 of the Louisiana State Constitution and LSA-R.S. 48:453 of the Louisiana Revised Statutes, all of which provide that the property owner will be compensated to the full extent of his loss for the taking, which in this case included the property owners' rental property which provided an income stream which was their sole source of income.

2. Whether the Louisiana Supreme Court and the Louisiana Second Circuit Court of Appeal erred in failing to take into consideration the penalty imposed by the Internal Revenue Code when making its determination that the fair market value of the expropriated real estate was sufficient to compensate the property owners, when IRC Section 1133 provides that a property owner will be penalized if he does not reinvest funds, which are received in an expropriation, in like-kind property; whether the penalty imposed when there is no reinvestment of the property should be a factor in determining the full extent of the loss to the property owner.

A LIST OF ALL PARTIES TO THE PROCEEDING

Charles and Marie Oswald
State of Louisiana, Department of Transportation & Development

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STATEMENT OF THE COURT'S JURISDICTION

i) March 29, 1996

ii) No request for rehearing was made

iii) There has been no cross-petition for writ of certiorari

iv) 28 USC 1257

v) Not applicable

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT FOURTEEN

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

26 USC 1033

INVOLUNTARY CONVERSION

(a) General Rule.

If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted -

(1) Conversion into similar property. Into property similar or related in service or use to the property so converted, no gain shall be recognized.

CONSTITUTION OF THE STATE OF LOUISIANA OF 1974
ARTICLE I. DECLARATION OF RIGHTS

Sec. 4. Right to Property

Section 4. Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question. In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss. No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction. Personal effects shall never be taken. But the following property may be forfeited and disposed of in a civil proceeding, as provided by law: contraband drugs; property derived in whole or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any of the above conduct; or other property because the above described property has been rendered unavailable.

This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

LOUISIANA REVISED STATUTES

TITLE 48

Section 453. Measure of compensation; burden of proof; extent of loss

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improvement

for which the property is taken.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the manner proposed or planned.

C. The owner **shall** be compensated to the full extent of his loss. The court shall include in its consideration the difference between the rate of interest of any existing mortgage on an owner-occupied residence of equal value.

D. The defendant shall present his evidence of value first.

E. Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed 25% of the difference between the award and the amount deposited in the registry of the court.

(Emphasis added.)

STATEMENT OF THE CASE

These are consolidated claims for compensation over and above the deposits made by the State of Louisiana to the property owners, Charles and Marie Oswald, in the taking of 35 rent houses on two parcels of property in Caddo Parish, Louisiana. Both parcels, 69-9 and 71-3, were taken in an eminent domain proceeding as part of the Interstate 49 project.

Prior to trial, the parties stipulated that the market value of Parcel 69-9 on the date of taking was $92,500.00 and of Parcel 71-3 on the date of taking was $85,000.00. The State originally deposited $88,264.00 on September 25, 1987, for the 18 houses and land in Parcel 69-9 and $81,537.00 on October 19, 1987, for the 17 houses in Parcel 71-3. This constitutes a difference of $4,236.00 on Parcel 69-9 and $3,463.00 on Parcel 71-3. Further, the parties stipulated to $2,000.00 damages on each parcel for rent loss, in addition to the increase in market value.

STATEMENT OF THE FACTS

Mr. Oswald purchased these houses, along with 60 others, from his aunt in 1977 for approximately $173,000.00 and, as additional consideration, his agreement to continue the management of other of her properties. Record at 122-123. He had managed this property, along with other properties belonging to his aunt, prior to his purchase. Record at 121. Before he bought the properties, he worked in the auto parts business full time and managed the properties part time. Record at 123. After he bought the properties in 1977, he managed these properties full time and lived off the income he made from those properties. Prior to the taking, he had no formal job training, and had never done any kind of work other than the management of the properties and the auto parts business. After the taking, he had a short stint in the windshield repair business. Record at 130.

The houses themselves were shotgun style, some single and others duplex. They were old, without many amenities, but were in good condition at the time of the taking. Record at 164. The houses were maintained by Mr. Oswald constantly over the years. Id. They were simple to maintain. As a result, the maintenance costs of these houses remained low and relatively constant.

These properties had a solid tenant base. Many tenants lived there for a long time. Record at 170. Usually there was little vacancy in the houses. At the time of taking the vacancy rate was approximately two percent. The average length of tenancy was 14.27 years on Parcel 69-9 and 8.35 years on Parcel 71-3. Record at 174; Exhibit D-6.

The value of these homes as rental property was greatest for Mr.

Oswald, who was intimately familiar with the houses and their tenants. He testified that he was close to the tenants, performing personal services for them. No other person could have made money off the houses as Mr. Oswald did. Their value in use to him was greater than market value, simply because of his relationship with the property. Record at 126-127.

Further, the State did not take only the houses, but also his customers - the tenants who lived there and who were relocated away from his houses before he received any money to purchase any other rental property into which to move them. Without this very stable group of tenants, cultivated over many years - even decades - he could not operate his business with stability. From that stability flowed minimal risk and increased profitability. Exhibit D-6.

The income per month on Parcel 69-9 was $1,695.00 and on Parcel 71-3 was $1,602.50, for a total gross income of $3,297.50 per month. Exhibit D-6. The total gross income per year for these units was $39,570.00. After subtracting expenses, the net income from these units was $28,749.00 per year. Exhibit D-5. Mr. Oswald, who at the time of taking did all of the work himself, lived on the net income. Record at 217.

Mr. Oswald also had other units purchased from his aunt. Some 45 of these units were sold because of their condition and their lack of profitability. Record at 151-152. He possessed another 12 units which were not taken by the state. Record at 129. After the taking, these units took too much time for the money returned. Id. He sold these also after the taking. The testimony indicated that Mr. Oswald would maintain these houses indefinitely. Id.

There were no other houses available like those of Mr. Oswald. Most were taken by the State. Id. Those that were left were in such shape as to render them basically valueless to anyone. Id. Unlike his houses, which he had maintained and had value to him because of his unique situation in managing the houses, these could not produce the quantity, quality and durability of the tenant base. Record at 175; Exhibit D-6.

He purchased three other rental properties with the money paid by the State for his houses. The first was a two bedroom, one bath house in Oil City for $25,000.00. He was not able to realize any income on the house. Record at 130-131.

The second house was a two bedroom one bath townhouse. He purchased the house for $55,000 in 1989 and sold it for $53,000 in September of 1993. In the interim he collected $4,800 per year in rent with an annual net income of $3,529.00. The annual rate of return was 6.416 percent. He sold the house with a capital loss in excess of $2,000.00. Record at 133-134; Exhibit D-5.

The third house is a three bedroom two bath house which he pur-

chased in 1989 for $58,000 and sold in 1991 for $66,000.00. In the interim he collected $7,800 in rent annually, for an annual rate of return of 5.593 percent. Record at 132-133; Exhibit D-5.

Mr. Oswald's annual income from his labors has been reduced substantially since the taking. Before the taking, Mr. Oswald worked on a daily basis on his houses on an average of 50 hours per week. He lived on the money he earned with the houses. Since the taking, that has not been possible. The State's contention that the amount awarded to him of $169,801 was sufficient to put him back in the same position he had prior to the taking has been proven wrong.

There were factors which lead to the reduction in Mr. Oswald's income. First, with fewer units, the effects of a single vacancy, or a single tenant, representing a collection problem were more severe. Record at 180. Second, rentals are more competitive at the higher income, resulting in a less stable tenant base. Id. There is a greater risk of vandalism and crime in a free standing unit, separate from others, as opposed to the shotgun houses, which stood very close together. Also, repairs and maintenance cost more in a rental unit which has more amenities, which require more repair and more attention. Maintenance costs are also higher because the units are not identical, and will require a greater variety of parts and supplies. Id. These units also were very far apart, requiring more time and effort to maintain. As a result of these factors, the cost to Mr. Oswald of maintaining these units was too great to allow a return. Id. Further, the gross income from these units was much less than he had received from the shotgun houses.

If he had not invested in real estate, he would have had to pay a severe tax penalty. 26 U.S.C. 1033. Record at 178. Because he could not replace his property and tenants, his income dropped substantially. His income would have dropped, in any event, if he had left the money in the bank. The interest rates which were available were low. He could not make the level of income that he formerly had earned.

The shotgun houses, which Mr. Oswald was familiar with since his youth, were essential to his business. Without them, he could not make a living. His property combined with his efforts resulted in a business enterprise, which was destroyed by the State's highway. The issue then becomes to what compensation is he entitled.

FEDERAL QUESTIONS

The Applicants raised the issues regarding the taking of property without full compensation at the Trial Court level. Further, Applicants raised the issue of the penalty imposed by the Internal Revenue Code rollover provision at the Trial Court level.

With regard to the due process issue, this issue was raised at the Trial

Court level through allegations of the failure of the State to compensate the Applicants for the full extent of their loss. Specifically, the Applicants alleged in their response to the original petition that they were entitled to be compensated to the full extent of their loss. The Trial Court ruled as follows:

> . . . [T]he evidence and testimony presented indicate that the defendant's ownership of the expropriated rental units amounted to an ongoing business rather than an investment. The defendant testified to the effect that the ownership and operation of these expropriated rental units was his primary source of income. It is clear that the defendant was more than a passive investor in the subject rental units. As lessor, the defendant was responsible for the maintenance of these rental units. The defendant performed almost all of the necessary repairs. Further, the defendant collected the monthly rent payments and kept financial records pertaining to the rental units. The 1986 Federal Income Tax Return of the defendant tends additional support to the finding that the operation of these rental units was the primary source of income for the defendant.

Record at 95.

The Second Circuit Court of Appeal disagreed, and ruled that the Trial Court was wrong in determining that the Oswald property was unique and indispensable such that the defendants should have been awarded anything other than the fair market value and the stipulated rental losses. Ignoring the testimony of the only expert witnesses who testified at trial, the Second Circuit determined that the tenant base was unstable and would have declined shortly . The location of the houses were not unique, according to the Second Circuit Court of Appeal, because these houses were similar to other houses located all over the city of Shreveport. The Court stated that it was bound by its decision in the Lobel decision. Without looking further, the Court determined that there were no additional damages due to Mr. Oswald other than those stipulated.

The Louisiana Supreme Court denied the Applicants' Application for Writ of Certiorari to the Louisiana Second Circuit Court of Appeal was denied on March 29, 1996, without opinion.

With regard to the issue of the Internal Revenue Code, the Trial Court did not rule on that issue specifically, even though it had been presented by testimony of Mr. Oswald and the Economist, Dr. Melvin Harju. Instead, the Trial Court determined that Dr. Harju's opinion as to the actual economic loss suffered by the Applicants, which took into consideration the penalty im-

posed by the Internal Revenue Code, was correct and awarded him the figure cited by Dr. Harju. Specifically, Dr. Harju factored in the projected penalty to the property owners if there were no reinvestment in like-kind property. The Trial Court had been provided evidence that Mr. Oswald had invested in like-kind property to his detriment. He would have had ore money returned if he had not been forced to re-invest those funds.

The appellate court and the state supreme court refused to consider the issue.

SUMMARY OF THE ARGUMENT

The owner of expropriated rental property is entitled to be compensated for all economic losses, including the replacement of the profit and income stream generated by the rental property. Rental property is not just an investment, but can be an ongoing business entitled to replacement cost new as compensation for the taking. State, Department of Transportation and Development v. Dietrich, 555 So.2d 1355 (La.1990); State through Department of Highways v. Constant, 369 So.2d 699 (La.1979). The Oswalds were entitled to the replacement value of the income stream which they had prior to the taking. A landowner who has an ongoing business is entitled to be compensated for all economic losses resulting from the taking. State through Department of Highways v. Constant, 369 So.2d 699, 701 (La.1979). The taking of the Oswald houses resulted in the destruction of an ongoing business which could not be replaced by the market value of the property itself. The market value of the property would be insufficient to compensate the Oswalds under Constant and the Louisiana Constitution of 1974. LSA-CONST. art. 1, Sec. 4; State, Department of Transportation & Development v. Dietrich, 555 So.2d 1355 ILa.1990); State through Department of Highways v. Constant, 369 So.2d 699 (La.1979). As a result, applicants could not be compensated fully in that manner. Restricting his losses to the market value of the property does not take into consideration his economic losses and his need to be placed in a pecuniary position equal to that he had prior to the taking.

The Trial Court's determination that the property owners had proven their claim to the replacement of business income should not have been overturned by the Louisiana Supreme Court and Second Circuit Court of Appeal. The Trial Court had ruled that the Oswalds had no other income for their support and further that the Oswalds were not passive investors. This property was the basis for their entire business and livelihood. After the taking, with the little money given by the State, the Oswalds attempted to restart their business with what buildings were available in the Shreveport area. The Trial Court agreed that they had shown by a preponderance of the evidence that the award of only market value was insufficient to compensate them for the full extent of the loss.

Further, the Louisiana Supreme Court and Second Circuit Court of Appeal erred when it did not take into consideration the penalty imposed by the Internal Revenue Code for property owners who do not invest in "like kind property" after an expropriation. Without such an investment, the Oswalds would have been forced to pay a penalty of $47,000.00. 26 U.S.C. 1033. If one believes the State and the Court of Appeal, the payment of the market value, depreciated for the age of the buildings, was sufficient to compensate the Oswalds. However, without the investment, the IRS would have penalized the Oswalds for a substantial portion of the award. The figures as

determined by the Court below compensated the Oswalds for the loss. The award as set by the Louisiana Supreme Court and Second Circuit Court of Appeal would not do so.

LEGAL ARGUMENT

Whether the Louisiana Supreme Court and the Louisiana Second Circuit Court of Appeal erred in overruling the Caddo Parish Trial Court in its determination that the property owner was entitled to compensation in excess of the market value of the property taken, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 4 of the Louisiana State Constitution and LSA-R.S. 48:453 of the Louisiana Revised Statutes, all of which provide that the property owner will be compensated to the full extent of his loss for the taking, which in this case included the property owners' rental property which provided an income stream which was their sole source of income.

The Louisiana statute which governs the measure of compensation allowable recognizes that the landowner is entitled to be compensated to the full extent of its loss. This statute is based upon the Louisiana Constitutional provision which provides that just compensation shall be paid to the owner whose property is taken by the State for a public purpose.

Section 453. Measure of compensation; burden of proof; extent of loss

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improvement for which the property is taken.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the manner proposed or planned.

C. The owner **shall** be compensated to the full extent of his loss. The court shall include in its consideration the difference between the rate of interest of any existing mortgage on an owner-occupied residence of equal value.

D. The defendant shall present his evidence of value first.

E. Reasonable attorney fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed 25% of the difference between the award and the amount deposited in the registry of the court.

(Emphasis added.)

LSA-R.S. 48:453.

The Oswalds cannot be compensated to the full extent of his loss by simply giving them the market value of the property. First of all, they do have an ongoing business involved in this rental property, not just an investment. The Trial Court found that to be true.

This is not an investment, wherein the Oswalds simply put money in to receive more money back. Webster's Dictionary, New Collegiate Edition, defines investment as "the outlay of money usually for income or profit: capital outlay; also, the sum invested or the property purchased." (Emphasis added.) Clearly, the management and ownership of these rental units were business duties which he actively pursued through which he earned a living. This is not an investment under the Webster's definition. Replacement value of the business should be awarded.

Mr. Oswald's principal occupation was that of an active landlord and real estate manager. He had managed these particular houses for 17 years. He had grown up in this business, his family having built and operated hundreds of housing units like the property involved in this case for decades. During the 1970's, Mr. Oswald acquired 95 units of former family property. The active management of these properties was Mr. Oswald's principal occupation, and formed the sole basis of Mr. Oswald's livelihood.

Mr. McCormick, the appraiser, testified that the expected viability of these houses was 15 to 20 years. Of course, the property would still have value after that point. Further, Mr. Oswald would have continued to maintain the houses as long as possible, potentially beyond the 20 year point, as long as he was receiving a return on the houses. In any event, the land would have value after that point, perhaps even more than presently, because of the

commercial nature of the property. The taking of these houses resulted in a loss to Mr. Oswald of a large chunk of his yearly income, which cannot be replaced by simply giving Mr. Oswald the market value of these houses.

The compensation due to Mr. Oswald can only be determined by reproducing his income stream from the houses that were taken. Dr. Harju and Mr. McCormick took into consideration the length of time the houses would exist and the remaining value of the land when determining the compensation due Mr. Oswald.

As a result of the loss of the buildings and the loss of the tenants, he lost his income. The Third Circuit supported a determination of an award of replacement of the income stream, when it stated

> The Court in Constant held that the eminent domain provision of the 1974 Constitution was intended to broaden the previous measure of damages. The Court further stated that full compensation of a business property owner requires that he not only be paid the market value of the property expropriated plus severance damages but, that he 'be put in as good a position pecuniarily as he would have been had his property not been taken.' State, Department of Transportation and Development v. Ford, 520 So.2d 774 (La.App.3rd Cir.1987).

The Court may award a sum which exceeds the market value of the property in a case such as this. Constant, supra; Monroe Redevelopment Agency v. Succession of Kusin, 398 So.2d 1159 (La.App.2d Cir. 1981); City of Shreveport v. Bernstein, 391 So.2d 1331 (La.App.2d Cir.1981). As this court noted in Bernstein,

> In State v. Constant, 369 So.2d 699 (La.1979) the Louisiana Supreme Court construed this constitutional provision to require compensation for any economic loss sustained by the property owner, including the cost of replacing his business facilities. the court pointed out that the intent of the pertinent constitutional provision was to 'broaden former constitutional concepts of the measure of damages' and 'to permit the owner to remain in equivalent financial circumstances after the taking.' It was not deemed constitutionally significant that the award to the landowner would exceed the market value of the property expropriated. 391 So.2d at 1334.

The Oswalds have clearly lost more than the market value of their

property here. They have essentially lost the core of the business, their clientele, who happen to be their tenants, and their buildings, which had been maintained by Mr. Oswald over the years. As a result, the payment of market value for the property is insufficient to compensate them.

Therefore, these shotgun houses, which are of very low cost on the market, are indispensable to the business which the Oswalds run. They cannot simply replace them and replace the business. The buildings had in and of themselves a uniqueness insofar as Mr. Oswald was concerned. As Mr. McCormick testified, the I-49 project wiped out the greater amount of these type of rental properties. Record at 165. What was left was not as well-maintained as that owned by Mr. Oswald. There were no properties left which were close in location, in good condition, easy to maintain, and with a regular tenant base.

Mr. Oswald had a particular clientele who rented from him. As Mr. McCormick testified, these tenants were for the most part long-term. He had tenants waiting to get into his houses. The State forced his tenants into comparable housing before the state paid him for his property. He had no other funds with which to purchase new property before the state paid him. Therefore, he lost his tenant base before he could purchase anything comparable, had there been anything available.

In addition, the location of these properties was important. These houses were close enough to each other to make Mr. Oswald's management cost-effective. They were close enough to retail areas to make it plausible for the tenants to walk to places where they needed to go.

Further, as explained by Dr. Harju in his testimony, Mr. Oswald clearly ran a business. This business was destroyed when the State took the 35 rent houses, leaving him with 12 houses which did not return the necessary income. The size of the business fell below minimum plant size, rendering the business unprofitable. Record at 239. The business was destroyed as a result of the State's actions.

The Louisiana Supreme Court in Constant ruled that the property owner must be put into as good a position after the taking as before. If that required that the property owner be paid replacement costs without depreciation, then that should be done. If that required that the property owner receive a sum greater than the market value of the property, then that should be done. What should not be done would be to provide the property owner with a windfall; i.e., the State should not provide the property owner with a sum greater than the replacement cost of the property or a sum greater than that required to put the property owner into as good a position pecuniarily as he was prior to the taking. The Louisiana Supreme Court never ruled that a property owner should be left in a situation where he is unable to continue his business as he conducted it prior to the taking. The Louisiana Supreme Court

never ruled that a property owner should lose his income from his labors without proper compensation. Yet, the State of Louisiana, in this case, has asked the Oswalds to do just that.

Those issues are sufficiently important to justify a consideration by this Honorable Court.

2.

The Louisiana Supreme Court and Second Circuit Court of Appeal erred when it did not take into consideration the penalty imposed by the Internal Revenue Code for property owners who do not invest in "like kind property" after an expropriation. Without such an investment, the Oswalds would have been forced to pay a penalty of $47,000.00. 26 U.S.C. 1033. If one believes the State and the Court of Appeal, the payment of the market value, depreciated for the age of the buildings, was sufficient to compensate the Oswalds. However, without the investment, the IRS would have penalized the Oswalds for a substantial portion of the award. The figures as determined by the Court below compensated the Oswalds for the loss. The award as set by the Louisiana Supreme Court and Second Circuit Court of Appeal would not do so.

If the Oswalds had not invested in real estate with the money paid by the State, they would have had to pay a severe tax penalty. 26 U.S.C. 1033. Because they could not replace their property and tenants, their income dropped substantially. Their income would have dropped, in any event, if he had left the money in the bank. The interest rates which were available were low. He could not make the level of income that he formerly had earned.

The economic losses suffered by the Oswalds also included the tax loss which would have been incurred by the applicants if no investment in real estate had been made. To state, as is stated in Constant, that in most cases the market value will compensate the property owner to the full extent of the loss, does not take into consideration the complications arising from the tax code and losses which could be suffered as a result. As shown at Court, the Oswalds could not live off the interest generated by the money paid by the State because he had to invest it in other real estate. As also shown at the trial court, payment of the market value of the property, depreciated because of age, did not provide enough money to purchase new rental property to generate the same income stream. If the Oswalds did purchase new - at least to them - property, the income from that property was not sufficient to provide the same income stream. That was shown at trial But if

the Oswalds relied on a return of interest paid on the money, they would have to pay the Internal Revenue Service a substantial sum - estimated in this case to be $47,000.00 - and therefore lose a great deal of the income-producing account. Surely, the State Constitution and the long line of cases interpreting that Constitution do not indicate such a result. The Internal Revenue Code certainly does not contemplate that the property owner, who is subject to an involuntary taking, would be penalized by the codal requirement to invest the funds in like-kind property. Yet, the property owners could not find property in the condition and location of the original property, and had to invest in different kinds of property which had neither the return or the low overhead of the property taken. The State insisted that the money paid was sufficient to compensate the applicants, and did not take into consideration what return would come from that money once invested in like-kind property. The Oswalds were trapped in a Catch - 22 situation. In a total taking such as this, when income-producing real estate is taken, the State should be forced to compensate the property owners in such a way as to replace the income stream from the property. Otherwise, the property owners have been seriously damaged by the taking and not left in the same position as they were before.

Respectfully submitted,



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Appendix A

STATE OF LOUISIANA
FIRST JUDICIAL DISTRICT COURT
CADDO PARISH, LOUISIANA
SECTION "A"

Docket No. 337,352 and 337,911

STATE OF LOUISIANA
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
Appellee,

---v.---

CHARLES RAY OSWALD, ET UX
Defendant-Appellate.

CONSOLIDATED WITH

STATE OF LOUISIANA,
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
Appellee,

---v---

CHARLES RAY OSWALD, ET UX
Defendant-Appellant

OPINION

The Court having considered the testimony and evidence presented now renders the following opinion.

This litigation involves the expropriation by the State of Louisiana, Department of Transportation and Development (DOTD) of two parcels of land owned by the defendant, Charles Ray Oswald. These parcels of land (numbered 69-9 and 71-3) were expropriated in connection with the construction of Interstate 49. Located on these two parcels of land were thirty five rent houses which were owned by the defendant. Pursuant to the requirement of the "Quick Taking Statute" found in La.R.S. 48:441 et seq., DOTD deposited into the registry of the Court the amounts of $88,264.00 and $81,537.00 for the parcels 69-9 and 71-3, respectively.

At trial, the following stipulations were entered into by the parties: (1) the market value of parcel 69-9 on the date of taking was $92,500.00 (2) the market value of parcel 71-3 on the date of taking was $85,000.00 (3) the defendants are entitled to recover $2,000.00 from the plaintiff for rental losses affecting parcel 69-9 prior to the date of taking (4) the defendants are entitled to recover $2,000.00 from the plaintiff for rental losses affecting parcel 71-3 prior to the date of taking (5) the defendants sustained no other losses prior to the date of taking (6) around or immediately following the date of the takings, an alternate investment capital market rate for U.S. Treasuries, 10 year investment term, was 10.18%, and (7) the plaintiff waives its right to call any witnesses on the remaining issues, but fully reserves its right to contest those issues based on the evidence and the law. Despite these stipulations concerning the fair market value of the respective parcels and rental losses suffered prior to the taking, the defendant seeks additional compensation for the expropriation of his property. Defendant argues that he

has not been compensated to the "full extent of the loss" as provided for in Article 1 Section 4 of the Louisiana Constitution and La.R.S. 48:453. Defendant's claim for additional compensation is based on the argument that the defendant was operating a business at the time of the expropriation. Therefore, defendant asserts entitlement to the replacement value of his then ongoing business which was disrupted by the expropriation of these parcels of land and rent houses located thereon.

The plaintiff, DOTD, asserts that the fair market value of these respective properties as per the stipulations, is sufficient to compensate the defendant for the "full extent of the loss." In support of this contention, plaintiff cites case law setting forth those elements which must be present in order for the replacement value of an ongoing business to be awarded. Plaintiff argues that these requisite elements were not present at the time of the expropriation. Further, plaintiff argues that even assuming the defendant is entitled to replacement costs exceeding the stipulated fair market value, the defendant still can generated more income than the actual operating income of the thirty five rental units by investing the stipulated fair market value coupled with minimum wage employment that should be secured by the defendant. Therefore, plaintiff claims that it is not necessary for the defendant to be awarded any amount above the stipulated fair market value of the parcels of land.

Article 1 Section 4 of the Louisiana Constitution in pertinent part provides that property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit. Additionally, La.R.S. 48:453 in pertinent part provides:

A. The measure of compensation for the property expropriated is determined as of the time the

estimated compensation was deposited into the registry of the court, without considering any change in value caused by the proposed improve ment for which the property is taken.

C. The owner shall be compensated to the full extent of his loss.

E. Reasonable attorney fees may be awarded by the Court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney fees in no event shall exceed twenty five percent of the difference between the award and amount deposited in the registry of the court.

The basic right of a private property owner to be protected from action of the government is preserved in both the State and Federal Constitutions and, accordingly, owners of expropriated property are entitled to full, complete, and adequate compensation. State through Department of Highways v. Stoer, 133 So2d 857 (La. App. 2 Cir. 1961). The constitutional guarantee of compensation to the full extent of an expropriated landowner's loss requires not only that the landowner receive no less than that amount, but it also insures that he receive no more than that amount. State, DOTD vs. Griffith, 585 so2d 629 (La. App. 2 Cir. 1991). Reference to constitutional documents and debates, as well as commentary subsequent to the adoption of the 1974 Constitution, indicates that the intent of Article 1 Section 4 was to broaden former constitutional concepts of the measures of damages and was intended to permit the owner to remain in equivalent financial circumstances after the taking. State, DOTD vs. Constant, 339 so2d 699 (La. 1979).

Although the constitutional right to property does not prohibit the state from compensating an owner for more than the full extent of his loss, it has never been the aim of our implemental legislative and jurisprudential

precepts to require anything more than just compensation for the owner's loss. La.R.S. 48:453, which was amended to incorporate these precepts and the constitutional principles of just compensation, is designed to compensate an owner only to the full extent of his loss. State Dept. of Highways vs. Bitterwolf, 415 so2d 196 (La. 1982).

Determination of what amount will compensate the owner of a property right to the full extent of his loss because of expropriation of the right must be made on the basis of the facts of each case and I accord with the uniqueness of the thing taken. Southern Natural Gas Co. v. Poland, 406 so2d 657 (La. App. 2 Cir. 1981). Measure of damages in expropriation cases is the market value of the land taken plus severance damages to the remainder if any. Constance vs. State, DOTD, 615 so2d 365 (La. App. 5 Cir. 1993). Generally, full compensation is measured by the market value of the expropriated property; in unusual situations, such as where the uniqueness and indispensability of the expropriated property would render it more valuable to the expropriatee than it would to the average buyer, the expropriatee is entitled to the replacement value. State, DOTD vs. Griffith, Supra.

Certain situations require that replacement cost be awarded in order to fully compensate the property owner, especially in unique situations in which an ongoing business is threatened. State, DOTD vs. Shannon-Page Inv., 478 so2d 702 (La. App. 3 Cir. 1985). Generally, though, the landowners may be compensated fully by other approaches than by awarding the replacement cost of the improvement taken, especially where the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' business operations on the site from which a part is taken. State Through Dept. of Highways vs. Constant, Supra.

Since Constant, appellate courts have granted compensation for damages incidental to the taking, such as replacement costs of improvements and business

losses. Board of Commissioners vs. Missouri Pacific Railroad Co., 625 so2d 1070 (La. App. 4 Cir. 1993); Packard's Western Store, Inc. vs. State, 618 so2d 1166 (La.App. 2 Cir. 1993). Layne vs. City of Mandeville, 633 so2d 608 (La. App. 1 Cir. 1993). Delegates to the Constitutional Convention explained that full compensation should include moving costs, costs to relocate, inconvenience, and loss of profits from taking of business premises. State, DOTD vs. Dietrich, 555 so2d 1355 (La. 1990).

In the instant case, the primary issue before the court is whether the defendant is entitled to recover any compensation above the stipulated fair market value of these two parcels of land. To decide this issue, it must be determined whether the expropriation disrupted an ongoing business being operated by the defendant.

In State, DOTD vs. Lobel, 571 so2d 742 (La. App. 2 Cir. 1990), the court had to determine a similar issue. In Lobel, the landowner/defendant owned tracts of land upon which he operated 28 rental houses. The defendant sought to recover the replacement value of the expropriated property. Citing Constant, supra, the court stated that an award of replacement value was the exception to the general rule that the fair market value of the expropriated property was the measure for full compensation. Lobel at 744, The Court further cited language from the opinion in Constant, supra, to guide its determination as to whether the replacement value of the expropriated property should be awarded:

> Generally, We assume, the landowners may be compensated fully by other approaches other than awarding them the replacement cost of the im provement taken, especially where the property is not shown to be unique in nature and location and also indispensable to conduct of the landowners' business operations on the site from which a part was taken...Lobel at 744.

The court in Lobel held that the market value, not replacement cost, was the appropriate compensation for the expropriation of these rental house. Lobel at 745. In support of its finding, the court set forth the following rationale:

> The factors espoused by Mr. Lobel simply fail to support his contention that these shotgun houses were truly unique. Although the expropriated rental units did have a high degree of tenant stability, the advanced age of many of the tenants implies that this stability would shortly and rapidly have begun to decline. Although the units were well main tained, the houses were some 50 years old. Mr.Lobel admitted to the increased need for main tenance as the houses became older.
>
> Additionally, we note that Mr. Lobel described his operation of the expropriated rental houses as merely one of his primary sources of income. Mr. Lobel himself referred to the expropriated rental units, not as his business, but as an investment.Lobel at 745.

In the instant case, the rationale set forth in Lobel, supra, is applicable to defendant's claim for compensation exceeding the stipulated fair market value. The defendant owned rental houses similar in nature to the rental houses discussed in Lobel, supra. The defendant did enjoy a high degree of tenant stability. However, due to the advanced age of many of these tenants, there is the implication that this stability would not have continued to last. Mr. Oswald testified to the effect that younger and more transient tenants had begun to rent the houses with more frequency.

These thirty five rental houses were over 50 years old. There was testimony to the effect that these rental units were of sound structure and had required infrequent maintenance.

The defendant only owned twelve rental units after the taking of the other thirty five rental units occurred. Defendant sold these remaining rental units because, according to his testimony, which the court finds to be credible and persuasive, defendant believed that these remaining rental units could not generate sufficient income to justify the continued ownership of them. After the expropriation, the defendant purchased three rental houses in Oil City and Bossier.

After considering the aforementioned factors, the evidence and testimony presented indicate that the defendant's ownership of the expropriated rental units amounted to an ongoing business rather than an investment. The defendant testified to the effect that the ownership and operation of these expropriated rental units was his primary source of income. It is clear that the defendant was more than a passive investor in the subject rental units. As lessor, the defendant was responsible for the maintenance of these rental units. The defendant performed almost all of the necessary repairs. Further, the defendant collected the monthly rent payments and kept financial records pertaining to the rental units. The 1986 Federal Income Tax Return of the defendant lends additional support to the finding that the operation of these rental units was the primary source of income for the defendant. Out of the $23,603.00 net income earned by the defendant, over $13,000.00 of this total income was attributable to his rental property.

The Court finds the defendant has proven entitlement to an award that exceeds the stipulated fair market value of the expropriated properties. This award should reflect the full extent of the economic loss the expropriation caused to the defendant's business operation.

The Court finds that a damage award representative of the replacement value of the defendant's business operation should be and is hereby set in the amount of One Hundred Seventy Seven Thousand Four Hundred

Twenty-one and 22/100 ($177.412.22) Dollars. This damage award was reached through the calculations as set forth in the testimony of Dr. Melvin Harju ($347,222.22 less the $169,801.00 already deposited in the registry of the Court). The court finds the testimony of Dr. Harju to be credible and persuasive. In addition, defendant is entitled to an award of Four Thousand and no/100 ($4,000.00) Dollars for rental losses suffered prior to the expropriation. Attorney fees are awarded on the basis of 25% of the difference between the amount awarded herein and the amount deposited in the registry of the court prior to the commencement of this trial. Pursuant to La.R.S. 48:455, the above damage award is to bear legal interest from the date of the presentation of the petition for expropriation until paid. All costs are cast against plaintiff. Expert witness fees for Dr. Melvin Harju and Mr. Cliff McCormick are assessed as costs of court to be paid by plaintiff. If the amount of such expert witness fees cannot be agreed upon by counsel, letter briefs concerning the setting of same are to be submitted to the undersigned within 20 days of receipt by counsel of this opinion. To the extent not granted herein, all other claims of the parties herein are rejected.

A judgment in accordance with opinion is to be prepared, signed as to form by all counsel of record and submitted to the undersigned for signature.

Shreveport, Caddo Parish, Louisiana, this the 2nd day of January, 1995.

/s/ CHARLES R. SCOTT, DISTRICT JUDGE

CHARLES R. SCOTT, DISTRICT JUDGE

Appendix B

[Filed Jan. 24, 1995]

FIRST JUDICIAL DISTRICT COURT
PARISH OF CADDO
STATE OF LOUISIANA

DOCKET NO.: 337,352 AND 337,911

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT

-against-

CHARLES RAY OSWALD, ET UX,
Defendants

JUDGMENT

CHARLES R. SCOTT, District Judge Caddo Parish:

This matter came on for trial on the merits as to the issue of compensation due defendants as a result of the expropriation of their property on December 1, 1993. Present were Ronald J. Bertrand, attorney for the STATE OF LOUISIANA, and Anna E. Dow, attorney for CHARLES RAY OSWALD and MARIE SONNIER OSWALD.

Considering the evidence adduced at trial and for the reasons set forth in written reasons of judgment dated January 2, 1995; it is hereby

ORDERED, ADJUDGED AND DECREED that

there be judgment in favor of CHARLES RAY OSWALD and MARIE SONNIER OSWALD and against the STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT, pay to the defendants CHARLES RAY OSWALD AND MARIE SONNIER OSWALD, the sum of THREE HUNDRED FORTY-SEVEN THOUSAND TWO HUNDRED TWENTY-TWO AND 22/100 DOLLARS (347,222,22),subject to a credit in the amount of the original deposits herein of ONE HUNDRED SIXTY-NINE THOUSAND EIGHT HUNDRED ONE AND NO/100 DOLLARS ($169.801.00); it is further

ORDERED, ADJUDGED AND DECREED that the STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT pay to the defendants the sum of FOUR THOUSAND AND NO/100 DOLLARS ($4,000.00) for rental losses suffered prior to the expropriation; it is further

ORDERED, ADJUDGED AND DECREED that the STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT pay attorneys fees in the amount awarded herein and the amount deposited in the registy of the court prior to the commencement of trial;

ORDERED, ADJUDGED AND DECREED that the defendants are to receive legal interest on the excess award of ONE HUNDRED SEVENTY-SEVEN THOUSAND, FOUR HUNDRED TWENTY-ONE AND 22/100 DOLLARS ($177,421.22) plus FOUR THOUSAND AND NO/100 DOLLARS ($4,000.00) , or ONE HUNDRED EIGHTY-ONE THOUSAND FOUR HUNDRED TWENTY-ONE AND 22/100 DOLLARS ($181,421.22) from the date of presentation of the petitions of expropriation until paid; it is further

ORDERED ADJUDGED AND DECREED that the following awards for experts' fees be made and taxed as

costs of court:

Clif McCormick. $3,000.00

Dr. Melvin Harju. $3,000.00

These costs and all other costs of court which are legally assessable against it are to be paid by the STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION & DEVELOPMENT.

JUDGMENT RENDERED at Shreveport, Louisiana, the 2nd day of January, 1995.

JUDGMENT SIGNED at Shreveport, Louisiana, on the 20th day of January, 1995.

/s/ CHARLES R. SCOTT
DISTRICT JUDGE

Agreed as to Form:

STATE OF LOUISIANA, DEPARTMENT
OF TRANSPORTATION & DEVELOPMENT

/s/ RONALD J. BERTRAND
Bar Roll Number 3060
Post Office Box 5
Rayne, Louisiana 70578
(318) 334-2139

CHARLES and MARIE OSWALD

/s/ ANNA E. DOW
Bar Roll Number 5040
Post Office Box 3456
316 Royal Street
Baton Rouge, LA70821
(504) 387-4982

Appendix C

Judgment rendered December 6,1995
Application for rehearing may be filed
within the delay allowed by
Art. 2166,LSA-CCP.

Nos. 27,752-CA
27,753-CA
(Consolidated Cases)

COURT OF APPEAL

SECOND CIRCUIT

STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA, DEPARTMENT Plaintiff-Appellant

OF TRANSPORTATION AND DEVELOPMENT

-V-

CHARLES RAY OSWALD, ET UX
Defendants-Appellant

* * * * *

Appealed from the
First Judicial District Court for
the Parish of Caddo, Louisiana
Trial Court No. 337,352

Before:

Honorable Charles R. Scott, Judge

* * * * *

BERTRAND & SOILEAU
Counsel for Appellant
By; Ronald J. Bertrand

ANNA E. DOW
Counsel for
Appellees

* * * * *

Before SEXTON, STEWART & PRICE (Pro Tem),
JJ.STEWART, J.

The Department of Transportation and Development brought expropriation lawsuits for two parcels of land owned by Charles Oswald and his wife. After consolidating the lawsuits, the trial court found that the Oswald properties were a business rather than an investment and that they were entitled to an amount that exceeded the fair market value of the property. DOTD was ordered to pay $358,542.44 plus legal interest and attorney's fees. The state subsequently lodged this appeal. We reverse in part, modify in part, affirm in part, and render.

FACTS

This cause of action arose out of the expropriation of two parcels of land by the State of Louisiana, Department of Transportation and Development, from defendants, Charles Oswald and his wife, for use in the construction of I-49 in Shreveport. On the property were 35 "shotgun" houses, which the defendants used as rental property. Pursuant to the requirements of the "Quick Taking Statute," found in LSA-R.S. 48:441, et seq., DOTD deposited into the registry of the court $88,624.00 and $81,537.00, as payment for parcels 69-9 and 71-3, respectively. At trial, the parties stipulated that the market value of parcel 69-9 was $92,500.00 and $85,000.00 for parcel 71-3. This amount exceeded the initial deposit by more than $9,699.00. The parties also stipulated to pre-expropriation rental losses of $4,000.00.

The primary issue at trial, as it is on appeal, was whether Mr.Oswald was entitled to any amount over the stipulated market value in order to fully compensate him for the expropriation. At trial, the defendants presented two expert witnesses, Dr. Harju, a professor of economics and finance at Louisiana State University and Cliff McCormick, an appraiser. Dr. Harju testified that the defendant had an

going business enterprise and not just an investment. McCormick explained that the defendant's business was unique because of the manner in which the houses were maintained, the houses proximity to each other and their proximity to the bus line, the disappearance of similar properties in the Shreveport area, the stable tenant base, and the defendant's system of handling the repair problems that frequently arose.

The trial court rendered judgment and ordered DOTD to pay Oswald the $169,801.00 already on deposit in the court registry, plus an additional $177,412.22 as the replacement value of the defendants business operation, $4,000.00 in pre-expropriation losses, and attorney's fees pursuant to the Quick Taking Statute. This award also includes legal interest from the date the petition was filed until paid. In its written reasons for judgment, the trial court found that the defendants' ownership of the rental units was an ongoing business and as such, the defendant was entitled to an amount above the stipulated fair market value. The state lodged this appeal.

DISCUSSION

On appeal, the state challenges the finding that the expropriated property was an indispensable part of an ongoing business and the award of damages in excess of the stipulated fair market value. The state argues that the rental units were merely investment property and not a unique and indispensable part of an ongoing business.

Property may not be taken or damaged by the state except for public purposes and with just compensation to the owner. In every expropriation the owner shall be compensated to the full extent of the loss. State, Dept. of Transp. and Dev. v. Griffith, 585 So.2d 629 (La. App. 2 Cir. 1990), citing LSA-Const. art. 1, 4; State Dept. . of Transp. and Dev. v. Lobel, 571 So.2d 742 (La. 1991), writ not considered, 577 So.2d 2 (La. 1991). The determination of what amount will compensate a landowner to the full extent

of the loss must be made on the basis of the facts of each case and in accordance with the uniqueness of the thing taken. Dept. of Transp. and Dev. v. Hammons, 550 So.2d 767 (La. App. 2d Cir. 1989); Southern Natural Gas Co. v. Poland, 406 So.2d 657 (La. App. 2d Cir. 1981), writ denied, 412 So.2d 86 (La.), cert denied, 459 U.S. 833, 103 S. Ct. 75 (1982).

Generally, full compensation is measured by the market value of the expropriated property or the price which would be agreed upon between the informed and willing buyers and sellers under usual and normal circumstances. State, Dept. of Transp. and Dev. v. Hammons, supra; State, Dept.. of Transp. and Dev. v. Fakouri, 541 So.2d 291 (La. App. 3d Cir. 1989), writ denied, 544 So.2d 405 (La. 1989). However, the expropriatee is not limited to the market value of his property, if such does not fully compensate his loss. State, Dept.. of Transp. and Dev. v. Dietrich, 555 So.2d 1355 (La. 1990); State, Dept. of Transp. and Dev. v. Constant, 369 So.2d 699 (La. 1979).

In unusual situations, the market value of the expropriated property constitutes in sufficient compensation and the expropriatee is entitled to replacement value, the amount necessary to reconstitute the property. However, an award of replacement value is the exception, not the rule. State, Dept. of Transp. and Dev. v. Griffith, supra. The Louisiana Supreme Court stated:

> We do not, by these rulings, announce any general principle that replacement cost is always the most appropriate measure of awarding land owner compensation for the taking of a physical asset used in his business...
>
> Generally, we assume, the landowners may be compensated fully by other approaches than by awarding them the replacement cost of the improvement taken, especially where (unlike the present instance) the property is not shown to be both unique in nature and location and also indispensable to the conduct of the landowners' busi

ness operations on the site from which a part is taken.State, Dept. of Transp. and Dev. v. Constant, supra at 706.

Clearly, it must be shown that the uniqueness and indispensability of the expropriated property would render it more valuable to the expropriatee than it would be to the average buyer. In such a case, the market value of the property would inadequately compensate the defendant and, based on his unique, indispensable need for the property, would place the defendant in a worse pecuniary position than he had been in before the taking. Id.; See State, Dept. of Transp. and Dev. v. Lobel, supra.

In the instant case, we disagree with the trial court's determination that the subject property was unique and indispensable such that the defendants should have been awarded anything other than the fair market value and the stipulated rental losses.

First, there is no indication that the rental units were unique. Although the units were apparently well maintained by Mr. Oswald, they were over 38 years old and, by his own admission, required a great deal upkeep and maintenance. Although counsel for defendants argues that Mr. Oswald had a solid tenant base, many of these tenants were of advanced age, which implies that this stability would shortly and rapidly have begun to decline.

Next, defendants claim that the location of the houses is unique because the units are within close proximity to each other and are located on a city bus line. However, Mr. Oswald, Dr. Harju, and Cliff McCormick all testified at trial that the houses in question were similar in style to other houses located all over the city of Shreveport. Although the defendants' houses may have been better cared for than others in the city, this alone is insufficient to establish that the subject properties are unique in location. Furthermore, this court in Dept. of Transp. and Dev. v. Lobel, supra, held that identical properties, similarly

maintained and owned by Bernard Lobel, located directly across the street from the rental units in the instant case, were not unique in nature or location and awarded Lobel only the fair market value of the property. This court is bound by its decision in Lobel.

Based on the evidence in the present record and the jurisprudence, we find the replacement value of the property taken in this case to be an inappropriate measure of damages.

DECREE

For the foregoing reasons, the decision of the trial court is reversed insofar as it awarded $177,712.22, as the replacement value of the defendants' business. The state is ordered to compensate the defendants in the amount of $181,500.00, which includes compensation for the expropriation of parcels 69-9 and 71-3 plus $4,000.00 in pre-expropriation rental losses. Pursuant to LSA-R.S. 48:455, $13,699.00, the amount of the judgment that exceeds the amount originally deposited in the court registry, is to bear legal interest from the date of the presentation of the petition until the judgment is paid. Additionally, pursuant to LSA-R.S. 48:451, 25% of $13,699.00, or $3,424.75 (the difference between the amount awarded as compensation and the amount deposited by DOTD), is awarded as attorney's fees. In expropriation proceedings, the condemning authority is taxed with the reasonable costs of the testifying expert witnesses retained by the landowner to assist him in attaining his just compensation. However, inasmuch as the state has not attacked the fees charged by defendants' experts, we will not disturb the amount awarded by the trial court.

REVERSED IN PART;
MODIFIED IN PART;
AFFIRMED IN PART;
RENDERED.

Appendix D-1

[Filed Jan. 18, 1996]

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, La. 71101
(318) 227-3700

To: Anna Dow
Attorney of Law
Post Office Box 3456
Baton Rouge, La 70821

Shreveport, Louisiana: January 18, 1996

Docket Number: 27752-CA

State of Louisiana, DOTD

-v-

Oswald, Charles Ray, et ux

BEFORE JUDGE: Sexton, Hightower, STEWART, J., Gaskins, Price
(AH)

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Defendant/appellee has this day been DENIED.

FOR THE COURT
Diana P. Heisler
Clerk of Court

cc: Ronald Bertrand Esq.

Appendix D-2

STATE OF LOUISIANA
COURT OF APPEAL, SECOND COURT
430 Fannin Street
Shreveport, La, 71101
(318) 227-3700

To: Anna Dow
Attorney at Law
Post Office Box 3456
Baton Rouge, LA 70821

Shreveport, Louisiana: January 18, 1996

Docket Number: 27753-CA

State of Louisiana, DOTD

-v-

Oswald, Charles Ray, et ux

BEFORE JUDGES: SEXTON, HIGHTOWER,
STEWART, J., GASKINS, PRICE (AH)

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Defendant/Appellee has this day been DENIED.

FOR THE COURT

Diana P. Heisler

Clerk of Court

cc: Ronald Bertrand Esq.

Appendix E

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA, DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT

-V-

NO. 96-C - 0445

CHARLES RAY OSWALD, ET UX

IN RE: Oswald, Charles Ray.; Oswald, Marie; - Defendant (s); Applying for Writ of Certiorari and/or Review; Parish of Caddo 1st Judicial District Court Div. "I" Number 337,352, 337,911; to the Court of Appeal, Second Circuit, Number 27752-CA, 27753-CA

March 29, 1996

Denied.

WFM
PFC
JCW
BJJ
JPV

Supreme Court of Louisiana
March 29, 1996

/s/ JOHN TARLTON OLIVIER
Clerk of Court
For the Court

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

(2)

No. 96-481

In The

Supreme Court of the United States

October Term, 1996

CHARLES RAY OSWALD, ET UX,

Petitioners,

v.

STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD J. BERTRAND
of
BERTRAND & SOILEAU
Post Office Box 5
Rayne, LA 70578-0005
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Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

QUESTIONS PRESENTED

I.

Did the award for compensation based on the stipulation of the parties to the market value of the property involved in these expropriation suits violate any rights of the Petitioner under the Fifth Amendment to the U.S. Constitution?

II.

Are any other substantial Federal questions presented in this application?

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RULE

Sup. Ct. R. 10 3

STATEMENT OF THE CASE

On September 25, 1987, the Louisiana Department of Transportation & Development filed suit in State District Court in Shreveport, Caddo Parish, Louisiana, in order to expropriate property from Charles and Marie Oswald which was necessary for the construction of Interstate 49 in Shreveport. On the same date and in conjunction with the filing of this formal expropriation proceeding, the State deposited the sum of $88,264 into the registry of the court for the benefit of the Oswalds. This amount represented the State's estimate of the market value of the property which was expropriated. The entire proceeding was done pursuant to the authority granted to the Louisiana Department of Transportation & Development by Louisiana Revised Statutes 48:441-460, commonly referred to as the "Quick Taking Statute".

On October 19, 1987, the Louisiana Department of Transportation & Development filed another formal expropriation suit against the Oswalds to obtain additional property along the same project needed for the construction of Interstate 49 in Shreveport. On that same date, a deposit was made into the registry of the court in the amount of $81,537 for the benefit of the Oswalds. This amount also represented the State's estimate of the market value of the property expropriated. This suit was also filed pursuant to the authority contained in the Louisiana Quick Taking Statute. The two lawsuits were consolidated shortly thereafter and have remained consolidated.

The Oswalds filed answers in both consolidated suits demanding additional compensation. They claimed that the market value of the property was higher than that

estimated by the State. They also felt that they were entitled to rental income losses and other losses above the market value of the property which are referred to in Louisiana law as "full extent" losses. These types of losses are recoverable in certain limited circumstances under Article I, Section 4 of the Louisiana Constitution of 1974.

At the beginning of the trial on the merits, the parties stipulated to the market value of the property expropriated in both lawsuits. There was also a stipulation on the amount of rental loss. This left open only the "full extent" loss issue, i.e. were the Oswalds entitled to an amount greater than the stipulated market value of the property involved in the consolidated suits?

After a trial on the merits on this issue, the District Judge found that the defendants were entitled to an award that exceeded the stipulated market value of the expropriated properties which would reflect, in the Court's words, "the full extent of the economic loss the expropriation caused to the defendants' business operation." A formal judgment was signed on January 20, 1995.

The State of Louisiana then appealed this judgment of the State District Court to the Louisiana Second Circuit Court of Appeal. On December 6, 1995, the Court of Appeal reversed the award by the Trial Judge which exceeded the stipulated market value of the property. The reversal was clearly based on the application of Louisiana law and contained absolutely no federal question issues. An application for rehearing was denied by the Court of Appeal on January 18, 1996.

A writ application to the Louisiana Supreme Court on behalf of the Oswalds was denied on March 29, 1996. It is noteworthy that not one Justice of the Louisiana Supreme Court voted to grant the application.

ARGUMENT

Petitioner contends that the jurisdiction of this Court is provided by 28 USC 1257. Respondent agrees that this is the statute that provides the authority for this Court to review a final judgment rendered by the highest Court of a State. That statute provides for review of State Court judgments in limited circumstances, i.e. (1) where the validity of a treaty or statute of the United States is drawn into question; (2) where the validity of a statute of any State is drawn into question on the ground that it is repugnant to the Constitution, treaties, or laws of the United States; or, (3) where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, or the treaties or statutes of the United States. It is obvious that there is no issue involved herein under either (1) or (2) above. The question as to whether any right of petitioner under the Fifth Amendment to the U.S. Constitution or under 28 USC 1033 has been violated will be discussed below.

Rule 10 of the Supreme Court Rules sets out the considerations governing review on certiorari. Section (b) covers a situation wherein a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. No such

allegation has been made herein by petitioner. Section (c) deals with the situation wherein a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. No such allegations have been made by petitioner in its application.

It would seem, therefore, that the only possible issue which this Court might consider is whether any rights of petitioner have been violated under the Constitution or statutes of the United States.

Did the award for compensation based on the stipulation of the parties to the market value of the property involved violate any rights of petitioner under the Fifth Amendment to the U.S. Constitution?

The Fifth Amendment to the U.S. Constitution provides that just compensation shall be paid when private property is taken for public use by eminent domain. Just compensation under the Fifth Amendment has consistently been held to mean the fair market value of the property on the date it is taken. *Kirby Forest Industries, Inc. v. United States,* 104 S. Ct. 2187, 2194 (1984). In this case the parties stipulated to the market value of the property expropriated by the State of Louisiana. By agreeing to and paying the stipulated market value of the expropriated property, the State of Louisiana complied with the requirements of the Fifth Amendment to the U.S. Constitution. Petitioner urges this Court to reinstate the Trial Judge's award of an amount in excess of market value which, in his words, "reflected the full extent of the

economic loss the expropriation caused to the defendant's business operation". It is clear from the jurisprudence applying the Fifth Amendment, however, that these types of losses are not available under the Fifth Amendment.

> "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so called 'market value'. It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory." *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 599.

In considering just compensation under the Fifth Amendment, any special or unique value to the owner of the property condemned by the government is not to be considered. *United States v. 26.3765 Acres Of Land*, 62 F. Supp. 910, 913.

Petitioner seemingly urges this Court to expand compensation under the Fifth Amendment to exceed the market value of the property expropriated by arguing that they could not reinvest that market value and generate the same net income that they previously received from the expropriated property. This would be a radical departure from the consistent federal jurisprudence interpreting compensation due under the Fifth Amendment, i.e. that is limited to the fair market value of the property.

> "The reason now advanced is that she sought to show improved prevailing interest rates at the time of taking to inform the jury just what

> amount of money she should receive to bring her as much income from stocks and bonds as she had been receiving from her farm lands and pecan orchard. Such evidence certainly was not relevant . . . Moreover, what people will do with money is as variable as are the tastes and capacities of men. . . . In the acquisition of land by condemnation, fair market value can not be based upon the capacity and experience of the landowner to handle and invest money. Furthermore, appellant's contention is unsound as a matter of law. The just compensation to which an owner is entitled is the fair market value of the property that has been taken." *3535 Acres of Land v. United States,* 146 F. 2d 872, 873 (5th Cir. 1945).

Louisiana's highest court has rejected petitioner's arguments even under Louisiana's much more liberal and expansive basis for awarding compensation under its Constitution. By affirming the holding of the intermediate appellate court, the Louisiana Supreme Court has indicated, without a dissenting vote, that the situation involved in these consolidated expropriation suits was not one in which an award exceeding market value was proper even under Louisiana's more liberal and expansive concept of compensation. There is certainly no basis for the argument that petitioner's rights under the Fifth Amendment have been violated.

Are any other substantial federal questions presented in this application?

Petitioner has attempted to create a federal question issue by bringing up 26 USC 1033, a federal statute that played a totally insignificant part in the trial of this

matter and played absolutely no part in the decisions of the Louisiana Supreme Court or the Louisiana Court of Appeal. No claim is made by petitioner that the validity of this statute has been drawn into question as required by 28 USC 1257(1), nor has there been any claim that any right under the statute has been violated by this expropriation under 28 USC 1257(3).

It must be remembered that the sole issue at the trial after the stipulation was whether or not petitioners were entitled, under Louisiana law, to any compensation in excess of market value. Petitioners argued that reinvestment of the stipulated market value would not allow them to replace the income stream from the expropriated property. The State attempted to show that this was not true. On rebuttal, petitioners raised the effect of 26 USC 1033 in an attempt to show that the State's theory was wrong.

In reversing the Trial Court's award for full extent losses in excess of market value, the Louisiana Court of Appeal never reached the issue of whether or not the income stream could be replaced by the investment of the stipulated market value. Instead, they ruled that petitioners were not entitled, as a matter of Louisiana law, to any amount in excess of market value under any circumstances. They found that, as a factual matter, the expropriated property was not of the type that would trigger any full extent compensation in excess of market value. Thus, the question of the effect of 26 USC 1033, which controls the tax consequences of involuntary conversions, did not factor into their decision at all. It is obvious that this federal statute played a totally insignificant and inconsequential part in this litigation.

It is interesting to note that petitioner's application contains no federal cases. Instead the argument is based entirely on four (4) Louisiana cases, the Louisiana Constitution and Louisiana statutes. While the Fifth Amendment and Fourteenth Amendment are generally referred to, no argument is ever made to show this Court how the Fifth Amendment was violated. No Fourteenth Amendment issues of any type are raised.

CONCLUSION

The sole possible federal issue involved in this application is whether or not petitioner has received compensation for the property taken pursuant to the Fifth Amendment to the U.S. Constitution. Since this Court's interpretation of just compensation under the Fifth Amendment limits it to the fair market value of the property expropriated, and since the parties stipulated to that fair market value, there can be no question but that the Fifth Amendment has been complied with. There are no other federal questions raised in the application which would possibly bestow on this Court jurisdiction pursuant to 28 USC 1257.

Respectfully submitted:

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